No. 83-2117

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

AMERICAN TRUCKING ASSOCIATIONS, INC., *et al.*,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
Petitioners,

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

and

ASSOCIATION OF AMERICAN RAILROADS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ASSOCIATION OF AMERICAN RAILROADS, TEXAS AND NORTHERN RAILWAY COMPANY, INC., AND LESCO TRUCKING COMPANY, INC.

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QUESTION PRESENTED

Whether the Interstate Commerce Commission acted within its statutory authority in concluding that recent amendments to the Interstate Commerce Act and changed circumstances in the railroad and trucking industries warrant the elimination of a doctrine requiring a motor carrier affiliated with a railroad to demonstrate "special circumstances" in order to obtain a license to conduct unrestricted motor operations.

LIST OF CORPORATE PARENTS, SUBSIDIARIES, AND AFFILIATES

TEXAS AND NORTHERN RAILWAY COMPANY, INC. and LESCO TRUCKING COMPANY, INC.

The Texas and Northern Railway Company, Inc. is a wholly owned subsidiary of Lone Star Steel Company, which is a wholly owned subsidiary of Philadelphia and Reading Corporation, a wholly owned subsidiary of Northwest Industries, Inc.

Lesco Trucking Company, Inc. is a wholly owned subsidiary of the Texas and Northern Railway Company, Inc.

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Respondents Association of American Railroads ("AAR"),[1] Texas and Northern Railway Company, Inc., and Lesco Trucking Company, Inc. respectfully request that this Court deny the petition for a writ of certiorari seeking review of the judgment of the United States Court of Appeals for the Fifth Circuit in this case. The

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[1] A list of the member railroads of the AAR is printed in the Appendix to this Brief.

opinion below is reported at 722 F.2d 1243 (5th Cir. 1984).[2]

STATEMENT OF THE CASE

The Court of Appeals for the Fifth Circuit unanimously upheld a decision of the Interstate Commerce Commission ("Commission") which abolished a requirement that a railroad-affiliated motor carrier must prove "special circumstances" in order to obtain an unrestricted license to conduct motor operations under 49 U.S.C. §§ 10922 and 10923 (1982). *American Trucking Associations, Inc. v. ICC*, 722 F.2d 1243, 1244, 1252 (5th Cir. 1984) (Pet. App. at 30a, 48a), *aff'g Ex Parte No. MC-156, Applications for Motor Carrier Operating Authority by Railroads and Rail Affiliates*, 132 M.C.C. 978 (1982) (Pet. App. at 1a).[3] The Fifth Circuit found that imposition of the "special circumstances" requirement in licensing cases was a Commission-created, court-approved policy rather than a statutory mandate. 722 F.2d at 1249 (Pet. App. at 40a). Accordingly, the court concluded that in light of recent amendments to the Interstate Commerce Act and changed conditions in the surface transportation industry, the Commission reasonably interpreted its statutory authority in abandoning the "special circumstances" doctrine and placing rail affiliates on the same footing as any other party seeking a license to perform new motor carrier operations. *Id.* at 1249-50 (Pet. App. at 41a-43a).

Petitioners, relying primarily on language in *American Trucking Associations, Inc. v. United States*, 364 U.S. 1 (1960) ("*ATA II*"), contend that the "special circumstances" doctrine was a binding "congressional

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[2] The opinion below will also be cited to the Appendix to the Petition for Certiorari as follows: Pet. App. at ——.

[3] In the absence of a showing of "special circumstances," the motor carrier license of a rail affiliate previously was limited to operations "auxiliary and supplemental" to its rail operations.

mandate," and thus not within the agency's authority to change absent an express congressional directive. *See* Petition ("Pet.") at 9, 12-14. On this basis, petitioners argue that the decisions below are in conflict with this Court's prior holdings. *Id.* at 12.

SUMMARY OF ARGUMENT

The Commission's decision is a classic example of an agency properly reevaluating and eliminating an outdated policy in light of a revised statutory mandate and fundamental changes in the industries it regulates. Originally fashioned in a regulatory era when a primary function of the agency was to protect a nascent trucking industry from domination by the then-powerful railroads, the "special circumstances" doctrine served to handicap railroads desiring to provide motor carrier service. While it may have been appropriate in its original regulatory context, the doctrine is clearly anachronistic today.

In the decades since the ICC first articulated and applied the "special circumstances" doctrine in licensing cases, the relative economic positions of the trucking and railroad industries have changed dramatically. The trucking industry, once believed to be in need of regulatory protection, is now well established and fully able to function in a more competitive environment. Moreover, the once-dominant railroad industry has encountered serious financial problems, caused in significant part by the effects of over-regulation. Congress specifically recognized these fundamental changes in the Motor Carrier Act of 1980 and the Staggers Rail Act of the same year, which substantially reduced regulatory controls over both industries and provided for the encouragement of intermodal—joint rail-motor—transportation.

These changes in the Commission's authorizing legislation and in the surface transportation industry formed a proper basis for its decision to eliminate the "special circumstances" doctrine in licensing proceedings. More-

over, the Fifth Circuit's refusal to interfere with that action was wholly consistent with this Court's decision in *ATA II*. The fundamental principle articulated by this Court with respect to the "special circumstances" doctrine is that in developing policies to implement the licensing provisions, the agency must apply the Interstate Commerce Act as a whole, and in so doing give effect to the National Transportation Policy. *See, e.g.*, ATA II, 364 U.S. at 11; *American Trucking Associations, Inc. v. United States*, 355 U.S. 141, 151-52 (1957) (*"ATA I"*); *see also United States v. Rock Island Motor Transit Co.*, 340 U.S. 419, 430-31 (1951); *ICC v. Parker*, 326 U.S. 60, 66-68 (1945). In view of the recent transformation of that Policy from one designed to protect motor carriers against competition to one that encourages competition within and among the transportation modes, the Commission was clearly within its discretion in concluding that its prior policy regarding "special circumstances" was no longer appropriate. *See, e.g., American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway*, 387 U.S. 397, 416 (1967); *see also Permian Basin Area Rate Cases*, 390 U.S. 747, 784 (1968).

Finally, petitioners have failed to demonstrate any substantial impact on the motor carrier industry as a result of the Commission's policy change. Review by this Court is thus unwarranted and unnecessary, and the petition accordingly should be denied.

REASONS FOR DENYING THE WRIT

I. PETITIONERS HAVE FAILED TO PRESENT ANY SIGNIFICANIT LEGAL ISSUE WARRANTING REVIEW BY THIS COURT

A. The Decision Below Is Not in Conflict with Prior Decisions of this Court

Petitioners' attempt to demonstrate a conflict depends entirely on their argument that prior decisions of this Court approving and enforcing the "special circumstances" doctrine transformed it from a pragmatic agency policy into a rigid statutory mandate. *See* Pet. at 9-12. As the court of appeals unanimously concluded, however, that argument misreads the prior cases and would seriously hamper the Commission's ability to respond to changing legislative goals and economic realities. *See* 722 F.2d at 1249 (Pet. App. at 39a-40a). Indeed, any fair analysis of *ATA II* and the other cases relied on by petitioners demonstrates that given the grounds upon which the Commission based its decision, its abandonment of the "special circumstances" doctrine for motor carrier licensing was entirely consistent with the prior decisions of this Court.

The licensing sections of the Interstate Commerce Act have never contained any express restriction on rail-affiliated motor carriers. *See ATA I*, 355 U.S. at 148-51.[4] Rather, the Commission at an early date decided to apply certain restrictions derived from a section of the Act dealing with acquisiitons[5] to rail affiliates applying

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[4] Originally enacted as §§ 207 and 209, respectively, of the Motor Carrier Act of 1935, 49 Stat. 551, 552, 49 U.S.C. §§ 307, 309, the "licensing sections" were recodified without substantive change in 1978 as 49 U.S.C. §§ 10922 and 10923. The 1980 amendments to the licensing sections are discussed in the text.

[5] *See* 49 U.S.C. § 11344(c) (1982). Section 11344 (the "acquisition section") was orginally codified as § 213 of the Motor Carrier Act of 1935, 49 Stat. 555, and recodified without significant change

for motor carrier operating licenses. *See Rock Island Motor Transit Co.—Purchase—White Line Motor Freight Co.*, 40 M.C.C. 457, 471, 473-474 (1946); *see also United States v. Rock Island Motor Transit Co.*, 340 U.S. at 428. Thus, unless the applicant demonstrated that "special circumstances" warranted an unrestricted grant, the Commission would limit the license granted a rail-affiliated motor carrier to operations auxiliary and supplemental to the affiliate's rail operations. *See Rock Island Motor Transit*, 40 M.C.C. at 466; *see also ATA II*, 364 U.S. at 10-11; *ATA I*, 355 U.S. at 149-50; *Kansas City Southern Transport Co., Common Carrier Application*, 10 M.C.C. 221, 240-41 (1938).

The Commission emphasized that this approach to licensing was based on the agency's own expertise and the then-existing National Transportation Policy:

> It is our opinion, . . . confirmed by nearly a decade of experience in motor carrier regulations, that . . . *the accomplishment of the purposes forming the national transportation policy*, require that, ex-

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as § 5(2)(b) by the Transportation Act of 1940, 54 Stat. 898. The section was again recodified in its present form in 1980.

The acquisition section restricts acquisitions of motor carriers by rail affiliates to those that yield a "public advantage in [the applicant's] operations," a term the Commission in its early decisions had interpreted to mean "auxiliary and supplemental to" the applicant's rail service. *See Pennsylvania Truck Lines Inc., Acquisition of Control of Barker Motor Freight, Inc.*, 1 M.C.C. 101, 111-12 (1936); *see also ATA I*, 355 U.S. at 147-48; *United States v. Rock Island Motor Transit*, 340 U.S. at 430-31. In a separate proceeding that is not at issue here, the Commission has recently eliminated the "special circumstances" doctrine in acquisition proceedings under 49 U.S.C. §§ 11343 and 11344, reasoning that in present circumstances the phrase "in its operations" should properly be interpreted to refer to the overall transportation activities of the carrier. *Ex Parte No. 438, Acquisition of Motor Carriers by Railroads* (July 20, 1984), *appeal pending sub nom. American Trucking Associations, Inc. v. ICC*, No. 84-7545 (9th Cir. filed Aug. 20, 1984).

> cept where unusual circumstances prevail, every grant to a railroad or to a railroad affiliate of authority to operate as a common carrier by motor vehicle or to acquire such authority by purchase or otherwise should be so conditioned as definitely to limit future service by motor vehicle to that which is auxiliary to, or supplemental of, train service.

Rock Island Motor Tranit, 40 M.C.C. at 473 (emphasis added).[6]

This Court has recognized that application of the "special circumstances" doctrine in licensing proceedings was an agency-created exception to "auxiliary and supplemental" restrictions that were, in the first instance, a carry-over of the ICC's interpretation of a terse statutory directive concerning motor carrier acquisitions. *See ATA I*, 355 U.S. at 149-50. While this Court has found that the Commission had the discretion to apply the restrictions in licensing proceedings, *United States v. Rock Island Motor Transit*, 340 U.S. at 430-31, 433, it has also emphasized "that the Congress did not intend the rigid requirement of [the acquisition section] to be considered as a limitation on certificates issued under [the licensing section]." *ATA I*, 355 U.S. at 150.

In asserting that the decisions below conflict with this Court's prior opinions, petitioners focus principally on one sentence in *ATA II* observing that "the underlying policy of [the acquisition section] must not be divorced from proceedings for new certificates under [the licens-

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[6] In *Rock Island Motor Transit*, the Commission specifically identified several distinct goals of the National Transportation Policy that supported application of the "special circumstances" doctrine, namely, "the preservation of the inherent advantages of motor-carrier service and of healthy competition between railroads and motor carriers and the promotion of economical and efficient transportation service by all modes of transportation and of sound conditions . . . among the several carriers." 40 M.C.C. at 473.

ing section]." Pet. at 10 (quoting 364 U.S. at 11).[7] That statement, however, was made by this Court in the context of its broader conclusion that in administering the licensing provisions, "the Commission must take 'cognizance' of the National Transportation Policy and apply the Act 'as a whole.'" *Id.*[8]

The Act "as a whole" has, of course, been substantially changed by the 1980 amendments—changes the Commission could properly consider in determining whether elimination of the old "special circumstances" doctrine was appropriate. There is nothing in this Court's prior decisions to indicate that, unless and until the acquisition provisions of the statute were modified, the Commission was necessarily required to continue its policy of applying the "special circumstances" doctrine in licensing cases—no matter how drastically the Act as a whole and conditions in the industry might change. Petitioners' effort to portray the decision of the court below as being in conflict with prior decisions of this Court thus rests on nothing more than a hypertechnical and selective reading of those decisions, divorced from their reasoning and the context in which they were reached.

Indeed, this Court's recognition that the doctrine and attendant restrictions had developed as an agency policy

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[7] Petitioners argue that the decisions below conflict with this Court's "governing decisions," relying primarily on *ATA II* as the "most recent" and "revealing" case in the series. Pet. at 9. But while this Court in *ATA II* summarized the "guiding principles which have been established" by the Commission in licensing rail affiliates over the years, 364 U.S. at 7, 11, its focus was on the "limited circumstance" of a single licensing proceeding departing from those principles and not on the Commission's authority to amend its licensing policies in the face of changed circumstances. 722 F.2d at 1248 (Pet. App. at 39a).

[8] Moreover, as described above, the Commission has since concluded that the "special circumstances" doctrine is no longer viable even in acquisition cases because of changes in the industry and in the statute as a whole. *See supra* note 5.

interpretation applying "the Act 'as a whole,' " indicates that it is fully consistent with prior decisions to hold, as the Fifth Circuit did, that the 1980 amendments establish a reasonable basis on which to eliminate the doctrine in licensing proceedings.[9] As this Court stated in *American Trucking Associations, Inc. v. Atchison, Topeka & Santa Fe Railway,*

> Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy. They are neither required nor supposed to regulate the present and the future within the inflexible limits of yesterday.

387 U.S. at 416; *see also Permian Basin Area Rate Cases*, 390 U.S. at 784.

The court of appeals properly found that the Commission's decision to abandon the "special circumstances" doctrine for licensing proceedings was just such an adaptation to fundamental changes in the transportation industry—changes that also had formed the basis for major amendments to the Interstate Commerce Act's regu-

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[9] Based on the erroneous assumption that "we are here concerned with a Congressional policy, confirmed by the decisions of this Court," Pet. at 15, petitioners assert that an entirely different standard of review should have been applied by the court of appeals. Pet. at 14-16. However, as the court of appeals correctly determined, this Court has not held the "special circumstances" doctrine in licensing proceedings to be "statutorily required, but rather simply a Court-approved Commission interpretation of its statute. . . ." 722 F.2d at 1249 (Pet. App. at 40). Hence, it was not necessary for the Commission to "meet the difficult burden of proving that the new [Interstate Commerce Act] provisions present the 'irreconcilable conflict' necessary to find a repeal by implication," but only to "meet the much easier burden necessary to justify a change in a longstanding policy or interpretation by an agency of its statute." *Id.*

latory scheme and policy mandate. *See* 722 F.2d at 1249 (Pet. App. at 41a). Petitioners' efforts to confine the Commission to inflexible limits derived from the statute prior to amendment and the industries' condition in an earlier day consequently do not present any issue warranting consideration by this Court.

B. The Basis for the "Special Circumstances" Doctrine Has Been Eliminated by Statutory Amendments and Changes Within the Industry

In arguing that the statutory basis for the "special circumstances" doctrine was unaltered by the 1980 amendments to the Interstate Commerce Act, Pet. at 12-13, petitioners have taken an unduly narrow view of the substantial statutory revisions Congress enacted. More important, petitioners have failed to recognize the profound changes in the railroad and trucking industries that prompted the amendments and that must be taken into account in assessing their effects.[10]

Petitioners focus entirely on two subsections of the Act that were not amended—a single clause of the National Transportation Policy directing that the Act be so administered "as to recognize and preserve the inherent advantage of each mode of transportation," 49 U.S.C. § 10101(a)(1)(A) (1982), and the portion of the acquisition section of the Act dealing with rail affiliates, 49 U.S.C. § 11344(c). Pet. at 12-13. In fact, as the prior

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[10] Several courts of appeals have noted the fundamental changes in regulatory structure and purpose wrought by the Staggers Act and the Motor Carrier Act in response to the evolving economic positions of the railroad and trucking industries. *See Texas v. United States*, 730 F.2d 339, 344 (5th Cir. 1984), *petition for cert. filed*, 53 U.S.L.W. 3001 (U.S. July 3, 1984) (No. 83-2102); *Refrigerated Transport Co. v. ICC*, 709 F.2d 1430, 1432 (11th Cir. 1983); *Central Forwarding, Inc. v. ICC*, 698 F.2d 1266, 1278 (5th Cir. 1983); *Cleveland-Cliffs Iron Co. v. ICC*, 664 F.2d 568, 587-88 (6th Cir. 1981); *American Trucking Association, Inc. v. ICC*, 659 F.2d 452, 458 (5th Cir. 1981).

decisions of this Court and the decisions below indicate, the "special circumstances" doctrine was predicated on three statutory provisions: the licensing sections, the entire National Transportation Policy, and the acquisition section. Of these, all but the third were revised substantially in 1980 by the Motor Carrier Act and the Staggers Act.

One of the most significant changes made by the 1980 Motor Carrier Act involved the licensing provisions, which were modified to increase "opportunities for new carriers to get into the trucking business and for existing carriers to expand their services." H.R. Rep. 96-1069, 96th Cong., 2d Sess. 3 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 2283, 2285. As the court of appeals noted, the new licensing provisions took a "radically different, deregulatory approach," 722 F.2d at 1249 (Pet. App. at 41a-42a), by drastically reducing the burden on an applicant seeking to enter into or expand its trucking operations.[11]

As reflected in its decision, the Commission carefully evaluated the effect of the new licensing provisions on the "special circumstances" doctrine and appropriately concluded that the doctrine "has no place in the procompetitive licensing regulations of the revised Interstate Commerce Act." 132 M.C.C. at 982 (Pet. App. at 7a-8a). This conclusion was properly accepted by the court of appeals, which confirmed that "the Commission acted

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[11] Under the amended Act, an applicant need only demonstrate "fitness" and that the proposed service "will serve a useful public purpose, responsive to a public demand or need . . . ." 49 U.S.C. § 10922(b)(1)(B) (1982). The prior criteria requiring determinations whether existing service is sufficient and whether the proposed service might jeopardize existing carriers were deleted. Moreover, the 1980 amendments shifted the burden of proof to those opposing new entry, and further provided that that burden will not be met merely by showing diversion of revenue or traffic from an existing carrier. *See* 49 U.S.C. § 10922(b)(2)(B) (1982).

reasonably in concluding that Congress did not . . . intend that high barriers should be retained for the railroads alone." 722 F.2d at 1250 (Pet. App. at 43a).

Congress also amended the National Transportation Policy in two critical ways. First, the Motor Carrier Act established "a new Federal policy which is [designed] to promote a competitive and efficient motor carrier industry," H.R. Rep. No. 96-1069 at 3, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 2285, and added a significant, specific goal to the National Transportation Policy: encouraging intermodal transportation. *See* 49 U.S.C. § 10101(a)(2)(I) (1982).[12] Second, the Staggers Act added to the Interstate Commerce Act a new rail transportation policy expressing the legislative intent to foster competition, minimize regulatory control, ensure effective coordination between rail carriers and other modes, and reduce regulatory barriers to entry and exit. 49 U.S.C. § 10101a.

As both the Commission and the court below recognized, these statutory changes provide further grounds for eliminating the "special circumstances" doctrine in licensing cases. In light of the clear congressional directive to encourage combined rail-motor operations and the Commission's conclusion that the doctrine was a substantial impediment to such operations,[13] the court of ap-

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[12] Like the motor carrier amendments, the Staggers Rail Act expressly encouraged the expansion of intermodal transportation. *See* 49 U.S.C. § 10505(f) (1982). This Court has previously sustained the Commission's interpretation of its statutory authority in the context of regulating intermodal transportation. *See American Trucking Associations, Inc. v. Atchison, Topeka and Santa Fe Railway*, 387 U.S. at 412-13, 421 (trailer-on-flatcar service); *United States v. Pennsylvania Railroad*, 323 U.S. 612, 616-17 (1945) (rail-water intermodal transportation).

[13] As the court of appeals explained, the Commission's conclusion was that "the special circumstances doctrine has a 'chilling effect' on intermodal operations, deterring . . . comprehensive new rail-

peals properly held that the Commission is not bound to "a mechanistic continuation of the old approach . . . in a changing regulatory environment." 722 F.2d at 1251 (Pet. App. at 45a).

The legislative changes described above announced a significant shift in the focus of surface transportation regulation, from one based on the protection of a fledgling trucking industry to one in which motor carriers are recognized to be fully capable of competing with railroads. As the legislative histories of both Acts make clear, that shift was in response to fundamental changes in the relative status of the two industries.

In amending the motor carrier provisions, Congress clearly recognized the need "to reflect the transportation needs and realities of the 1980's." Motor Carrier Act of 1980, Pub. L. No. 96-296, § 3(a), 94 Stat. 793. The legislative history documents the strength of the trucking industry and its ability to compete without the need for extensive regulatory protection:

> [T]he motor carrier of property industry for all intents and purposes is a healthy industry that has effectively competed with other freight-hauling modes. The industry as a whole generates about $108 billion in revenues annually, or about 75 percent of the revenues earned by all forms of transportation. Therefore, the intent of this legislation is to overhaul outmoded and archaic regulatory mechanisms, while retaining the pluses of an industry that has worked by simply conducting itself under the "rules of the game."

H.R. Rep. No. 96-1069 at 2, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 2284.

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motor strategies . . . ." 722 F.2d at 1251 (Pet. App. at 46a). The Commission specifically found that eliminating the doctrine "will reduce this 'chilling effect.' " 132 M.C.C. at 989 (Pet. App. at 17a).

In contrast, the legislative history of the Staggers Act portrays the adverse effects of years of over-regulation and undercapitalization of the railroads,[14] and recognizes that "[t]he overall effect of [federal] regulation has meant that railroads have been severely handicapped in their ability to compete with other modes of transportation." H.R. Rep. No. 96-1035, 96th Cong., 2d Sess. 38 (1980), *reprinted in* 1980 U.S. Code Cong. & Ad. News 3978, 3983. Thus, the House Committee stated:

> While the pervasiveness of government railroad regulation has grown over the years, the development of less regulated or unregulated transportation competition has also grown. Both motor carrier and water carrier competition have continued to take . . . business away from the railroads. Today, the once dominant railroad industry accounts for but 36 percent of the inter-city ton miles of freight. . . . The railroads . . . carried 91 percent fewer tons in 1977 than they did in 1947. . . .
>
> In absolute terms, . . . trucks now carry almost 50 percent more tonnage than the railroads. In 1947, railroads were hauling three times as much tonnage as motor carriers.

Id. at 35, *reprinted in* 1980 U.S. Code Cong. & Ad. News at 3980.

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[14] The Staggers Rail Act of 1980 Declaration of Findings, Pub. L. 96-448, § 2, 94 Stat. 1896 (codified at 49 U.S.C. § 10101a note) states that while historically "railroads were the essential factor" in the national transportation system, § 2(1), "today, most transportation within the United States is competitive." § 2(3). In particular, Congress found that nearly two-thirds of the Nation's intercity freight was transported by non-rail modes, § 2(5), and that railroad industry earnings were "the lowest of any transportation mode and . . . insufficient to generate funds for necessary capital improvements." § 2(6). Congress further noted that "failure to achieve increased earnings within the railroad industry will result in either further deterioration of the rail system or the necessity for additional federal subsidy." § 2(8).

As the unanimous court below held, the Commission properly reevaluated its "special circumstances" doctrine for motor carrier licensing on the basis of these profound changes in the transportation industry and the statutory amendments they engendered. *See* 722 F.2d at 1249 (Pet. App. at 41a); *see also* 132 M.C.C. at 979-80, 982 (Pet. App. at 3a-4a). The "radically different, deregulatory approach" to licensing adopted in the 1980 Motor Carrier Act and the contemporaneous changes to the National Transportation Policy eliminated the original justifications for the doctrine—justifications that were integral to this Court's decisions in *ATA I* and *ATA II*. The decision below is thus in harmony with the revised mandate of the Interstate Commerce Act and wholly consistent with the prior decisions of this Court.

II. PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE DECISION BELOW WILL HAVE ANY SUBSTANTIAL IMPACT ON THE ECONOMIC HEALTH OF THE MOTOR CARRIER INDUSTRY

Petitioners' argument that the economic health of the motor carrier industry will be adversely affected by repeal of the "special circumstances" doctrine, Pet. at 16-17, does not warrant review by this Court. That merely reiterates claims that have already been considered—and rejected—by both the Commission and the court of appeals. As the Commission found, a number of factors—including the dominant percentage of revenues generated by the motor carrier industry, the declining position of the railroad industry as reflected by intercity ton miles of freight, the poor earnings of the railroad industry, and its inability to generate funds for necessary capital improvements—reveal the present economic position of the motor carrier industry to be much healthier than that of the rail industry. *See* 132 M.C.C. at 982 (Pet. App.

at 8a).[15] Based on these findings, the Commission properly concluded that "the ability of motor carriage to compete successfully with other forms of transportation undercuts the basic protective rationale for the 'special circumstances' doctrine." *Id.* The court of appeals correctly deferred to the Commission's judgment with respect to this factual issue, 722 F.2d at 1252 (Pet. App. 47a-48a), and petitioners' efforts to relitigate it in this Court are inappropriate. *See Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309-10 (1974); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

Petitioners' failure to demonstrate that the Commission's action will have any substantial impact on the motor carrier industry is confirmed by the fact that the Commission has authority to deny any individual license application by a rail affiliate if a protesting carrier is able to show that granting the application would be inconsistent with the public convenience and necessity. And, of course, the Commission's decision in any such case will be subject to judicial review. Petitioners have offered no reason for concluding that those procedures are inadequate to guard against any concrete harms that may arise. Petitioners' speculations concerning possible

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[15] Petitioners' selective ranking of certain transportation companies based on data shown from Fortune Magazine, Pet. at 17, Supp. App. 1b, 2b, does not refute the Commission's findings. Ranking railroads versus motor carriers on the basis of assets is misleading, because railroads of necessity have an enormous investment in the rail lines over which they run, whereas motor carriers operate over highways owned and maintained by federal, state, and local governments. Moreover, by comparing revenues generated to assets, it is apparent even from petitioners' list that the railroads' return is far worse than that of the trucking companies. In any event, petitioners' data is incomplete in that certain large motor carrier systems such as United Parcel Service (ranked third in revenues and twelfth in assets on the Fortune list) and PIE/Ryder are not included. One of the largest railroads, the Union Pacific, is also inexplicably omitted from petitioners' exhibit.

future effects of the Commission's elimination of the "special circumstances" doctrine consequently provide no justification for review of the instant case by this Court.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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September 26, 1984

APPENDIX

APPENDIX

MEMBERS OF THE ASSOCIATION OF AMERICAN RAILROADS

FULL MEMBER ROADS (U.S. LINES)

Akron, Canton & Youngstown Railroad Company
Alton & Southern Railway Company
Atchison, Topeka & Santa Fe Railway Company

Baltimore & Ohio Railroad Company
    Curtis Bay Railroad Company
    Staten Island Railroad Corporation
Baltimore & Ohio Chicago Terminal Railroad Company
Bangor & Aroostook Railroad Company
    Van Buren Bridge Railroad
Belt Railway Company of Chicago
Bessemer & Lake Erie Railroad Company
Birmingham Southern Railroad Company
Burlington Northern Railroad Company

[Canadian Pacific Limited—lines operated in U.S.]:

    Canadian Pacific lines in Maine
    Canadian Pacific lines in Vermont
Chesapeake & Ohio Railway Company
    Covington & Cincinnati Elevator Railroad & Transfer & Bridge Company
Chicago & Illinois Midland Railway Company
Chicago & North Western Transportation Company
Chicago & Western Indiana Railroad Company
Chicago, Milwaukee, St. Paul & Pacific Railroad Company
Colorado & Southern Railway
Consolidated Rail Corporation

Denver & Rio Grande Western Railroad Company
Detroit & Mackinac Railway Company
Duluth, Missabe & Iron Range Railway Company

Elgin, Joliet & Eastern Railway Company

Fort Worth & Denver Railway

Galveston, Houston & Henderson Railroad Company
[Grand Trunk Corporation—and other lines in the U.S. indirectly controlled by the Canadian National Railways]:

Grand Trunk Western Railroad Company
Detroit, Toledo & Ironton Railroad Company
Central Vermont Railway, Inc.
Duluth, Winnipeg & Pacific Railway Company
[Canadian National Railways]:

Lines in Michigan
Lines in New England
Lines in New York
Lines in Vermont

Green Bay & Western Railroad Company

Houston Belt & Terminal Railway Company

Illinois Central Gulf Railroad Company
Chicago & Illinois Western Railroad Company
Waterloo Railroad

Kansas City Southern Railway Company
Arkansas & Western Railway Company
Fort Smith & Van Buren Railway Company
Kansas & Missouri Railway & Terminal Company

Kentucky & Indiana Terminal Railroad

Lake Superior & Ishpeming Railroad Company
Lake Terminal Railroad Company
Louisiana & Arkansas Railway Company

McCloud River Railroad Company
McKeesport Connecting Railroad Company
Maine Central Railroad Company
Portland Terminal Company
Manufacturers Railway Company
Metro North Commuter Railroad Company
Missouri-Kansas-Texas Railroad Company including
Beaver, Meade & Englewood Railroad Company

Missouri Pacific Railroad Company
Brownville & Matamoras Bridge Terminal Company
Chicago Heights Terminal Transfer Company
Doniphan, Kensett & Searcy Railway Company
Weatherford, Mineral Wells and Northwestern Railway Company

National Railroad Passenger Corporation (AMTRAK)
Newburgh & South Shore Railway Company
Norfolk & Western Railway Company
Chesapeake Western Railway Company
Lake Erie & Fort Wayne Railroad Company
Lorain & West Virginia Railway Company
New Jersey, Indiana & Illinois Railroad Company
Norfolk, Franklin & Danville Railway Company

Peoria & Pekin Union Railroad Company
Pittsburg & Shawmut Railroad Company
Pittsburgh & Lake Erie Railroad Company
Montour Railroad Company
Youngstown & Southern Railway Company
Prescott & Northwestern Railroad Company

Richmond, Fredericksburg & Potomac Railroad Company

St. Louis Southwestern Railway Company
Seaboard System Railroad, Inc.
Gainesville Midland Railroad Company
Soo Line Railroad Company
Sault Ste. Bridge Company
Southern Pacific Transportation Company
Holton Inter-Urban Railway Company
Northwestern Pacific Railroad Company
Petaluma & Santa Rosa Railroad Company
Visalia Electric Railroad Company
Southern Railway System
Alabama Great Southern Railroad Company
Algers, Winslow & Western Railway Company
Atlantic & East Carolina Railway Company
Camp Lejeune Railway Company

Carolina and Northwestern Railway Company
Central of Georgia Railroad Company
Cincinnati, New Orleans & Texas Pacific Railway Company
Georgia Northern Railway Company
Georgia Southern & Florida Railway Company
Interstate Railroad Company
Live Oak, Perry & South Georgia Railway Company
Louisiana Southern Railway Company
State University Railroad Company
Tennessee, Alabama & Georgia Railway Company
Tennessee Railway Company

Texas Mexican Railway Company

Union Pacific Railroad Company
Spokane International Railroad Company
Mt. Hood Railway Company
Union Railroad Company (Pittsburgh)

Vermont Railway, Inc.

Western Maryland Railway Company
Western Pacific Railroad Company
Sacramento Northern Railway Company
Tidewater Southern Railway Company
Western Railway of Alabama
Atlanta & West Point Rail Road Company
Winston-Salem Southbound Railway
High Point, Thomasville & Denton Railroad

SPECIAL CANADIAN AND MEXICAN MEMBER ROADS

CANADIAN LINES (in Canada)

Algoma Central Railway
British Columbia Hydro & Power Authority
British Columbia Railway
Canadian National Railways
Canadian Pacific Limited
Ontario Northland Railway
Toronto, Hamilton & Buffalo Railway
White Pass & Yukon Corp. Ltd.

MEXICAN LINES (in Mexico)

Chihuahua Pacific Railway Company
[Direction General de Ferrocarriles en Operacion]:

Ferrocarril Sonora-Baja California, S.A. de C.V.
Ferrocarriles Unidos del Sureste, S.A. de C.V.
Ferrocarril del Pacifico, S.A. de C.V.
National Railways of Mexico

ASSOCIATE MEMBERS

(55 Domestic—19 Foreign)

Alaska Railroad (ALASKA)
Aliquippa & Southern Railroad Company
American Refrigerator Transit Company
Apalachicola Northern Railroad Company

Belfast & Moosehead Lake Railroad Company
Boston & Maine Corporation
Springfield Terminal Railway

California Western Railroad
Centromen Puru Incorporated
Chestnut Ridge Railway
Chicago Short Line Railway Company
Chicago South Shore & South Bend Railroad
Chicago, West Pullman & Southern Railroad Company
Chilean State Railways (CHILE)
Cities Service Company Railroad
Cliffs Western Australian Mining Co. Pty. Ltd. (AUSTRALIA)
Colorado & Wyoming Railway Company
Cuyahoga Valley Railway Company

Dardenelle & Russellville Railroad Company
Delaware & Hudson Railway Company
Greenwich & Johnsville Railway Company
Delray Connecting Railroad Company
Devco Railway (Cape Breton Dev. Corp.—Coal Div.) (CANADA)
Duluth & Northwestern Railroad Company

East Erie Commercial Railroad
East Jersey Railroad & Terminal Company
East St. Louis Junction Railroad Company
Empresa Minera Del Centro Del Peru Railways (PERU)
Essex Terminal Railway (CANADA)

Fepasa-Ferrovia Paulista (BRAZIL)
Fruit Growers Express Company

Genesee & Wyoming Railroad Company
Grafton & Upton Railroad Company
Graysonia, Nashville & Ashdown Railroad Company
Great Western Railway Company

Hamersley Iron Pty. Ltd. (WESTERN AUSTRALIA)
Hartford & Slocomb Railroad Company
Hillsdale County Railway Company, Inc.

India, Gov't. of: Ministry of Railways (INDIA)

Japanese National Railways (JAPAN)

Korean National Railroad (KOREA)

LaSalle & Bureau County Railroad Company
Lenawee County Railroad Company, Inc.
Long Island Rail Road Company
Louisiana & North West Railroad Company

Manufacturers' Junction Railway Company
Maryland & Pennsylvania Railroad Company
Metro North Commuter Railroad Company
Michigan Northern Railway Company, Inc.
Middletown & Hummelstown Railroad Company
Minnesota, Dakota & Western Railway Company
Monongahela Connecting Railroad Company

New Orleans Public Belt Railroad
Northeast Illinois Railroad Corporation

Pacific Fruit Express Company
Pearl River Valley Railroad Company
Pickens Railroad-National Railway Utilization Corp.
Port Authority of New York & New Jersey (The)
Providence & Worcester Company
Public Transport Commission of New South Wales (AUSTRALIA)

Rede Ferroviaria Federal S.A. (BRAZIL)
River Terminal Railway Company

Roberval & Saguenay Railway Company (CANADA)
Roscoe, Snyder & Pacific Railway Company

San Diego & Arizona Eastern Transportation Company
Sierra Railroad Company (California)
Somerset Railroad Corporation
South African Railways (REPUBLIC OF SOUTH AFRICA)
Southern Indiana Railway, Inc.
Spanish National Railways (RNFE) (SPAIN)

Taiwan Railway Administration (REPUBLIC OF CHINA)
Texas & Northern Railway Company

Upper Merion & Plymouth Railroad Company

Victoria A Minas Railway (BRAZIL)

Wabush Lake Railway Ltd. (CANADA)
Warwick Railway Company
Washington Terminal Company

Yancey Railroad Company